EDWIN P. KEEGAN, JR.

IBLA 82-735 Decided June 25, 1982

Appeal from decision of Idaho State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. I MC 35032 through I MC 35035.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Evidence: Burden of Proof -- Evidence: Sufficiency -- Mining Claims: Abandonment

   There is a legal presumption, which is rebuttable, that official acts of public officers are regular. On the other hand, there is a presumption that mail properly addressed and with adequate postage affixed, and deposited in an appropriate receptacle, is duly delivered. When these two presumptions come into conflict and BLM states that it did not receive the instrument, the burden is on the one asserting that it was delivered to show that it was, in fact, timely received by BLM. Appellant in this case has not carried his burden of proof by showing that BLM received the documents.

2. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim -- Mining Claims: Recordation

   Under sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on or before Oct. 21, 1976, must file a notice of intention to hold or evidence of performance of annual assessment work on the claim on or before

Oct. 22, 1979, and prior to Dec. 31 of each year thereafter. This requirement is mandatory, and failure to comply is deemed conclusively to constitute abandonment of the claim by the owner and renders the claim void.

3. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment -- Mining Claims: Abandonment

The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by statute itself. A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences.

APPEARANCES: John E. Keegan, Esq., Seattle, Washington, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Edwin P. Keegan, Jr., appeals the March 24, 1982, decision of the Idaho State Office, Bureau of Land Management (BLM), which declared the Lucky Betsy Nos. 1 through 4 lode mining claims, I MC 35032 through I MC 35035, abandoned and void for failure of the owner to file with BLM prior to December 31, 1980, evidence of assessment work or a notice of intention to hold the claims as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and 43 CFR 3833.2.

The claims were located in 1955. Copies of the notices of location and a proof of labor were filed with BLM October 15, 1979. Proof of labor for 1981 was submitted to BLM December 9, 1981. The only proof of labor for 1980 accompanied the appeal.

Appellant asserts he has done the required assessment work on the claims every year since they were located in 1955, and has recorded a proof of labor every year in the Boundary County, Idaho, records. He cannot state with certainty or prove that he mailed the 1980 proof of labor to BLM, but he thinks that he did after recording it in Boundary County September 15, 1980. He contends that he has no intention of abandoning these claims and, in fact, continues to occupy and develop them. He asserts the decision declaring the claims abandoned and void is a denial of due process, and that he should have had actual notice in 1980, instead of constructive notice. He states that

BLM did send him a notice in 1981 to file the proof of labor that year, but no such notice was received in 1980. He argues that a hearing should be held before there is termination of his rights in these mining claims. He states there are no third party rights involved so that a finding that the claims are intact in his ownership would be proper in the circumstances.

[1] Various presumptions come into play when an appellant alleges transmittal of an instrument, but BLM has no record of its receipt. On one hand, there is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. See, e.g., Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976); Bernard S. Storper, 60 IBLA 67 (1981); Phillips Petroleum Co., 38 IBLA 344 (1976). On the other hand, there is a presumption that mail properly addressed and with adequate postage affixed, and deposited in an appropriate receptacle, is duly delivered. See, e.g., Donald E. Jordan, 35 IBLA 290 (1978). When these two presumptions have come into conflict, the Board generally has accorded greater weight to the former. See David F. Owen, 31 IBLA 24 (1977). We believe that public policy considerations dictate that greater weight be given to the presumption of regularity over that accorded the presumption that mail, duly addressed, stamped, and deposited, is delivered.

Thus, where, after diligent and thorough search BLM states it did not receive the instrument, the burden is on the appellant to show that the instrument was, in fact, received timely by BLM. See H. S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981).

Appellant's statement that he thought he transmitted the 1980 proof of labor to BLM does not overcome the presumption of regularity by the BLM employees. It is the receipt of the instrument which is critical.

The regulations define "file" to mean "being received and date stamped by the proper BLM office." 43 CFR 1821.2-2(f); 43 CFR 3833.1-2(a). Thus, even if loss of the envelope, containing the evidence of assessment work and addressed to BLM, was caused by the Postal Service, that fact would not excuse appellant's failure to comply with the cited regulations. Cf. Regina McMahon, 56 IBLA 372 (1981); Everett Yount, 46 IBLA 74 (1980). The Board has repeatedly held that a mining claimant, having chosen the Postal Service as his means of delivery, must accept the responsibility and bear the consequence of loss or untimely delivery of his filings. Don Chris A. Coyne, 52 IBLA 1 (1981); Regina McMahon, supra; Amanda Mining & Manufacturing Association, 42 IBLA 144 (1979). Filing is accomplished only when a document is delivered to and received by the proper BLM office. Depositing a document in the mails does not constitute filing. 43 CFR 1821.2-2(f).

[2] Section 314 of FLPMA requires the owner of unpatented mining claims located prior to October 21, 1976, in addition to filing with BLM a copy of the official record of the notice of location, to file with BLM evidence of the assessment work performed on the claim or notice of intention to hold the claim within 3 years after the date of the Act, i.e., on or before October 22, 1979, and before December 31 of each calendar year thereafter. The statute also provides that failure to file such instruments within the

time periods prescribed shall be deemed conclusively to constitute an abandonment of the mining claim by the owner. 43 U.S.C. § 1744(c) (1976); 43 CFR 3833.4(a). As the requirement to file is mandatory, not discretionary, failure to comply must be conclusively deemed to constitute an abandonment of the claim by the owner and renders the claim void. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981); James V. Brady, 51 IBLA 361 (1980).

[3] Arguments similar to those here presented were considered by the Board in Lynn Keith, supra. With respect to the conclusive presumption of abandonment and appellant's argument that the intention not to abandon was manifested, we stated:

> The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself, and would operate even without the regulations. See Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management, Civ. No. 78-46 M (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. Thomas F. Byron, 52 IBLA 49 (1981).
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> * * * Appellant also argues that the intention not to abandon these claims was apparent * * *. At common law, evidence of the abandonment of a mining claim would have to establish that it was the claimant's intention to abandon and that he in fact did so. Farrell v. Lockhart, 210 U.S. 142 (1908); 1 Am. Jur. 2d, Abandoned Property §§ 13, 16 (1962). Almost any evidence tending to show to the contrary would be admissible. Here, however, in enacted legislation, the Congress has specifically placed the burden on the claimant to show that the claim has not been abandoned by complying with the requirements of the Act, and any failure of compliance produces a conclusive presumption to abandonment. Accordingly, extraneous evidence that a claimant intended not to abandon may not be considered. [Emphasis in original.]

53 IBLA at 196-97, 88 I.D. at 371-72.

Appellant suggests that Topaz Beryllium Co. v. United States, 479 F. Supp. 309 (D. Utah 1979), stands for the proposition that once the Secretary of the Interior has been put on notice of the existence of a claim, that claim cannot be declared abandoned and void for failure to comply with the filing requirements of the statute without notice and an opportunity to comply. Appellant urges that BLM had notice of the existence of the claims from the notices of location filed in 1979 and, therefore, BLM should have afforded appellant notice and an opportunity to file before declaring the claims abandoned, especially since BLM sent a notice in 1981, but not in 1980. We disagree with appellant's interpretation of the initial decision in Topaz

Beryllium. On appeal, the Tenth Circuit held in Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981), that the Department's regulations under FLPMA which authorize an unpatented mining claim to be deemed abandoned and void if filings required by the Act were not made is not in excess of statutory jurisdiction, authority, or limitations. The critical distinction between the facts considered by Topaz and this case is that the filings here were expressly required by the Act, whereas those in Topaz were based upon purely regulatory requirements which expanded the statutory requirements in 43 U.S.C. § 1744 (1976). The court held that the conclusive presumption of abandonment would not apply in the case of failure to comply with such additional regulatory requirements absent a notice of deficiency and opportunity to comply. See Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981). Here, however, we have a failure to comply with an express statutory requirement, and the consequences for failure to comply with such requirement may not be waived by this Department. Lynn Keith, supra. Additionally, the Ninth Circuit in Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981), held that the FLPMA requirement for filing unpatented mining claims was not arbitrary or unreasonable.

BLM was under no obligation to notify appellant of the need for a 1980 filing. The fact that it did so in 1981 was merely a courtesy which appellant had no right to expect. Those who deal with the Government are presumed to have knowledge of the law and the regulations duly promulgated pursuant thereto. 44 U.S.C. §§ 1507, 1510 (1976); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Donald H. Little, 37 IBLA 1 (1978). The responsibility for complying with the recordation requirements rested with appellant.

Due process does not require notice and a right to be heard prior to initial decision in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final. Appeal to this Board satisfies the due process requirements. George H. Fennimore, 50 IBLA 280 (1980); Dorothy Smith, 44 IBLA 25 (1979); H. B. Webb, 34 IBLA 362 (1978). Appellant's request for a hearing is denied.

Appellant has urged that because no third party rights are involved, a finding that his claims are intact would be appropriate. As was pointed out above, this Board has no authority to grant relief to owners of mining claims who fail to comply with the statutory authority to grant relief to owners of mining claims who fail to comply with the statutory requirements of FLPMA. Additionally, we note that the records of BLM indicate that conflicts exist between the Lucky Besty claims of appellant and the mining claims known as Janet, I MC 10788; Jeep, I MC 10791; Jimmy, I MC 10793; Marie, I MC 10794; Clara, I MC 10795; and Bobby, I MC 10796; of the Shoshone Silver Mining Company, Coeur d'Alene, Idaho.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Anne Poindexter Lewis
Administrative Judge